UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/591
25 June 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 591

Case No. 653: UDOVIK

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Ioan Voicu, Mr. Mikuin Leliel Balanda;

Whereas at the request of Larissa Udovik, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 August, 22 October 1991, 31 March and 30 April 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 30 April 1992, the Applicant filed an application requesting the Tribunal:

"...

(a) to endorse the unanimous recommendation of the Joint Appeals Board that the Applicant 'be granted a personal upgrade from G-4 to G-6 retroactive to 1 January 1985 and that her salary and allowances from 1 January 1985, until her separation and her termination indemnity afterwards be adjusted accordingly' (...), and

(b) to grant Applicant such other relief, including interest, as the Administrative Tribunal may deem just and appropriate."

Whereas the Respondent filed his answer on 15 September 1992;

Whereas the Applicant filed written observations on 16 October 1992;

Whereas, on 4 June 1993, the Tribunal put questions to the Respondent, who, on 8 and 11 June 1993, provided his answers thereto;

Whereas, on 16 June 1993, the Applicant provided her comments thereon;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 8 November 1967, as an English Clerk in the Department of Economic and Social Affairs. She was offered a three-month fixed-term appointment at the G-2 level, converted to a probationary appointment with effect from 8 February 1968 and to a permanent appointment, with effect from 1 November 1969. On 22 March 1972, the Applicant's appointment was terminated for unsatisfactory service. Upon the Applicant's request for administrative review of this decision, the Secretary-General rescinded the termination, on the recommendation of the Appointment and Promotion Panel (APP). The Applicant was reinstated, with retroactive effect, from 22 March 1972.

On 1 May 1973, the Applicant was reassigned to the Internal Audit Service, Department of Administration and Management. Her functional title was changed to Audit Clerk, with effect from 1 October 1974. She was promoted to the G-4 level, with effect from 1 April 1976, as Senior Audit Clerk.

After the introduction of the new seven-grade classification of posts in the General Service and related categories in New York, in December 1985, the Applicant's post was reclassified to the G-7 level.

On 19 May 1986, the Deputy Director, Division for Policy Co-ordination, Office of Personnel Services, informed executive and administrative officers of all departments, that, while implementation of the results of the classification of posts "should not normally depend on satisfactory service", in cases "where action has been taken to withhold a salary increment, to initiate termination procedures because of unsatisfactory services

or where there is on file a reference in writing to unsatisfactory performance prior to implementation date, the Chief, Staff Services, should be consulted".

On the same date, the Executive Officer for the Department of Administration and Management wrote to the Office of Personnel Services, recommending the termination of the Applicant's permanent appointment for unsatisfactory services.

On 5 June 1987, the Assistant Secretary-General for Human Resources Management[1] (OHRM) advised executive and administrative officers that "implementation of the reclassification results should only be withheld if implementation would be totally inconsistent with other action being taken with respect to the staff member's performance and after consultation with the staff service".

On 24 March 1987, the Executive Officer, Department of Administration and Management, informed the Applicant as follows: "in view of the action initiated by the Department for termination for unsatisfactory service, implementation of the classification exercise in your case is pending."

In a letter dated 27 September 1989, the Assistant Secretary-General, OHRM, informed the Applicant that the Secretary-General had decided to accept the APP's recommendation to terminate her appointment for unsatisfactory service. The administrative procedures regarding the Applicant's termination were completed in 1989.

An appeal lodged by the Applicant against the decision to terminate her appointment was considered by the Joint Appeals Board (JAB) which adopted its report on 7 January 1991. Its conclusions and recommendations read as follows:

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[1] Successor of the Office of Personnel Services.

"55. The Panel concludes that

- the decision to terminate the appellant's permanent employment for unsatisfactory service was not improperly taken,

- the decision to withhold the implementation of the reclassification of the appellant's post was not in accordance with the relevant guidelines;

- the appellant did not succeed in carrying the burden of proof necessary to establish that any of the contested decisions were due to prejudice.

56. Accordingly, with regard to the withholding of the implementation of the reclassification, the Panel recommends that the appellant be granted a personal upgrade from G-4 to G-6 retroactive to 1 January 1985 and that her salary and allowances from 1 January 1985, until her separation and her termination indemnity afterwards be adjusted accordingly.

57. The Panel makes no further recommendation in support of the appeal."

On 14 February 1991, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her that the Secretary-General had re-examined her case in the light of the report, and had "decided, in accordance with the Board's recommendation, to maintain the decision to terminate your permanent appointment for unsatisfactory service." He added:

"At the same time, he has decided not to accept the Board's recommendation that you be upgraded from G-4 to G-6 retroactive to 1 January 1985 and that your salary and allowances from 1 January 1985 until the date of your separation as well as your termination indemnity be adjusted accordingly. The Secretary-General's decision is based on the following considerations:

(a) that the results of the initial classification of posts in the General Service and related categories in New York were not implemented in December 1985, as had been first intended, but in 1987, following the necessary approval by the General Assembly in its

> resolution 41/209 of 11 December 1986 of the Secretary-General's proposals on the matter. Thus following the issuance of ST/IC/86/27/Add.3 of 27 January 1987, which informed the staff of the action being taken to implement the results of the exercise as approved by the Assembly, you were advised by memorandum of 24 March 1987, from the Executive Officer, Office of Financial Services, that in your case implementation was pending in view of the action which had been initiated for termination of your appointment. Accordingly, implementation of the results of the classification exercise, albeit retroactive to 1 January 1985, took place after action had been initiated on 19 May 1986, for the termination of your appointment.
>
> (b) that, in any case, you could not have been retroactively upgraded because this would have been contrary to Article 101, paragraph 3, of the Charter and staff regulation 4.2 which establish as the paramount consideration in promotion the necessity of securing the highest standards of efficiency, competence and integrity."

After her separation from service on 29 September 1989, the Applicant had applied for a disability benefit from the United Nations Joint Staff Pension Fund.

In a letter dated 25 November 1991, the Secretary of the UN Joint Staff Pension Fund informed the Applicant that the UN Pension Committee had granted her a disability benefit pursuant to article 33 of the Pension Fund Regulations. In a letter dated 23 December 1991, the Assistant Secretary-General, OHRM, informed the Applicant as follows:

> "As you are aware, the United Nations Joint Staff Pension Committee has decided to award you a disability benefit on account of your incapacity for further service in accordance with the provisions of article 33 of the Regulations of the Pension Fund. On being advised that the Staff Pension Committee has agreed to award you the said benefit, the Secretary-General has decided to authorize the termination of your permanent appointment under staff regulation 9.1(a). This termination precedes your termination for unsatisfactory services effective 29 September

1989, which must be retroactively cancelled, since by implication, your services were unsatisfactory because of your medical condition.

Your new termination for reasons of health under staff regulation 9.1(a) and the termination indemnities you received will be adjusted in accordance with the provisions of Annex III (b) to the Staff Regulations since you received six months of termination indemnities under Annex III (c) and three months' compensation in lieu of notice when you were terminated for unsatisfactory services in September 1989.

The Secretary of the UN Joint Staff Pension Board will advise you of the commencement of payment of your disability benefit and my office will take all the necessary steps to process your separation with maximum dispatch. This letter constitutes formal notice of termination as required by staff rule 109.3(a). The effective date of the termination of your appointment will be 14 October 1990.".

On 30 April 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to pay the Applicant the difference in salary in accordance with the new classification of her post was invalid because it was not in accordance with the established guidelines.

2. Any justification to withhold the difference in pay disappeared as a result of the subsequent retroactive cancellation of the decision to separate her for unsatisfactory services and its replacement by a termination for reasons of health.

Whereas the Respondent's principal contention is:

The decision not to promote Applicant accorded with the requirement in the Staff Regulations that the paramount consideration for promotion is performance. Secretariat memoranda to Departmental Executive and Administrative Officers must be read consistently with the Staff Regulations.

The Tribunal, having deliberated from 3 June to 25 June 1993, now pronounces the following judgement:

I. The main issue in this case is whether the Applicant's rights were violated by the Administration's decision to withhold the implementation of the reclassification of the Applicant's post from the G-4 to the G-6 level because of the action it had initiated to terminate the Applicant for unsatisfactory service. The reclassification resulted from the introduction of a seven grade structure for the General Service and Related Categories in New York.

II. Reclassification of the Applicant's post from the G-4 to the G-7 level was to be implemented retroactively to 1 January 1985, when authorized by the General Assembly. However, pursuant to information circular ST/IC/86/27/Add.3 of 27 January 1987, the initial upgrading of the Applicant's post would have been by two levels, to G-6 and then, a year later, to G-7, subject to a review of her performance by the relevant Career Development Committee. The implementation of the upgrading was originally scheduled to take place in December 1985, but, as a result of General Assembly resolution 41/209 of 11 December 1986, it was postponed until 1987.

III. The Tribunal notes that, because the Applicant's performance had been deemed unsatisfactory for a variety of reasons, a recommendation was made, on 19 May 1986, to the Office of Personnel Services (OPS) by her Department to terminate her permanent appointment. Also, on 19 May 1986, internal advice was furnished by OPS to executive and administrative offices that, while implementation of the results of the classification of posts should not normally depend on satisfactory service, if action had been taken to initiate termination procedures because of unsatisfactory service, the Chief, Staff Services, should be consulted before implementing the reclassification.

IV. The Tribunal further notes that, on 5 June 1987, the Assistant Secretary-General for Human Resources Management, advised executive and administrative offices that implementation of the reclassification (which had been approved by the General Assembly to take effect in 1987) should only be withheld if it would be totally inconsistent with other action being taken with respect to the staff member's performance and after consultation with staff services. The point was repeatedly made that reclassification was a technical exercise, not a promotional exercise, and that except in extraordinary cases, it should be dealt with as such.

V. The Tribunal requested, on 4 June 1993, additional information from the Respondent. In his reply dated 9 June 1993, the Respondent asserted that the internal guidelines regarding implementation of reclassification decisions circulated to executive and administrative offices in May 1986 and in June 1987, provided for possible withholding of the reclassification of posts due to unsatisfactory service by their incumbents. The Respondent maintained that, according to the evidence, the Applicant's services were unsatisfactory, and had been so for a considerable period of time.

VI. In view of the absence from the file of an indication of consultation with Staff Services either in 1986 or 1987, by the executive or administrative officers of the Applicant's department regarding implementation of the reclassification of her post, the Tribunal requested additional information from the Respondent as to whether such consultation occurred.

The Tribunal notes from the Respondent's answer dated 11 June 1993,that at the time when the initial classification exercise was implemented, consultations were held by the then Executive Officer with the Personnel Officer and the Chief of Staff Services. They agreed that any decision to promote the Applicant based on the classification of the post would be contradictory to the ongoing discussions of the Applicant's performance which was

unsatisfactory. A comment on the decision not to change the grade was included in the Personnel Action form dated 16 March 1987, reflecting change to the new classification system and renumbering of the staff member's post.

VII. The Tribunal was also informed that no reclassification resulting from the reclassification exercise was implemented prior to 1987. In addition, the Respondent stated that the results of the initial classification exercise were implemented only in 1987, following the General Assembly's approval of the results in section IX of its resolution 41/209 of 11 December 1986. However, as the effective date for the implementation of the results of the initial classification exercise was 1 January 1985, staff members whose posts were classified at levels above their personal grade, were placed at the classified level of their posts with retroactive effect to 1 January 1985, provided they met the conditions specified in the implementation procedures set forth in annex 1 of information circular ST/IC//86/27.

VIII. The Tribunal observes that considerable delay occurred between the recommendation in 1986, to terminate the Applicant's appointment and the actual termination. In part, this was due to the Applicant's unwillingness to nominate two staff members to the Joint Review Group that was to consider and make a recommendation regarding her termination. Further delay was caused by her arguments on whether a special report called for by the applicable procedural regulations had been prepared. Eventually, the Joint Review Group submitted its report, finding that the Applicant had shown total disregard for UN working hours, performed unsatisfactorily, and had engaged in unprofessional conduct. It recommended that her appointment be terminated. The termination became effective on 29 September 1989.

IX. The Tribunal notes that, before the JAB, the Applicant challenged both her termination and the failure to reclassify her

post. The JAB found no fault with the termination but considered that the failure to reclassify her post "was not in accordance with the relevant guidelines". The JAB felt that, because the original indication in December 1985, of non-implementation of the reclassification occurred before the termination recommendation in May 1986, it was not in accord with the internal advice that action regarding non-implementation of reclassifications should be taken only after a termination recommendation. The JAB recommended that the Applicant's reclassification to the G-6 level be made effective as of 1 January 1985. The Respondent declined to accept this recommendation on the ground that the JAB had overlooked the fact that, due to General Assembly action, implementation of the entire reclassification exercise had been deferred until 1987 and that, since the recommendation for the Applicant's termination was made in May 1986, the internal advice had been followed. The Tribunal also notes that the basis for the termination of the Applicant's appointment was in existence, long before implementation of the reclassification.

X. The Tribunal finds that, with respect to the invocation of considerations relating to promotion and performance, there seems to be some ambivalence on the part of the Administration. On the one hand, reclassification is described as a technical exercise unrelated to performance (cf. Judgement No. 388, Moser (1987), paras. V and VIII) and, on the other hand, performance-related considerations enter into the picture regarding the one-year period following a raise by two grades before a raise by an additional grade may be made effective. They also enter into the picture in connection with termination recommendations, step increases, etc. It may be desirable for the Administration to consider clarification of this matter by an appropriate staff rule or administrative instruction. (Cf. Judgement No. 506, Bhandari (1991), para. VII.)

XI. The Tribunal is faced with exceptional circumstances in the present case, i.e. action on the part of the Respondent, dated 23 December 1991, retroactively cancelling the Applicant's previous termination for unsatisfactory service.

In the Respondent's view, the retroactive cancellation of the initial termination, with effect from 29 September 1989, by the decision of 23 December 1991, changing the basis for the Applicant's termination, implied no retroactive reassessment of the quality of her unsatisfactory services. The Tribunal notes that the essence of the decision of 23 December 1991, communicated to the Applicant in a letter signed by the Assistant Secretary-General, OHRM, was that the United Nations Joint Staff Pension Committee had decided to award the Applicant a disability benefit, on account of her incapacity for further service in accordance with the provisions of article 33 of the Regulations of the Pension Fund. The letter further stated that in the light of that award, the Secretary-General had decided to authorize the termination of her permanent appointment under staff regulation 9.1(a).

XII. The Tribunal notes that the decision of 23 December 1991, was based on a finding by the UN Staff Pension Committee under article 33(a) of the Pension Fund Regulations. Rule 4.1 of the Administrative Rules of the United Nations Joint Staff Pension Fund delegates to the Staff Pension Committee of a Member Organization the responsibility to consider applications for disability benefits. The Tribunal observes that article 33(a) of the Pension Fund Regulations provides that: "A disability benefit shall, subject to article 41, be payable to a participant who is found by the Board to be incapacitated for further service in a member organization reasonably compatible with his abilities...".

XIII. The Tribunal considers that, in the present context, the decision taken on the basis of the above-mentioned article cannot be regarded as transforming the nature of the Applicant's service. In the view of the Tribunal, the decision of 23 December 1991, was

a decision of derivative nature, pursuant to the finding of the UN Staff Pension Committee, that the Applicant was incapacitated for further service. The Tribunal also cannot ignore the fact that the record establishes extreme dissatisfaction by the Administration with the Applicant's performance and conduct since 1982.

XIV. The Tribunal concludes that the decision of 23 December 1991, is not inconsistent with the decision to refuse to implement retroactively reclassification of the Applicant from the G-4 to the G-6 level, and that, in the circumstances of this case, the latter decision was within the Respondent's authority.

XV. In the light of the foregoing, the Tribunal finds that the Applicant is not entitled to the retroactive reclassification of her post from the G-4 to the G-6 level and, therefore, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Ioan VOICU
Member

Mikuin Leliel BALANDA
Member

Geneva, 25 June 1993

R. Maria VICIEN-MILBURN
Executive Secretary

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 592

Case No. 657: SUE-TING-LEN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Ioan Voicu; Mr. Francis Spain;

Whereas at the request of Barbara Sue-Ting-Len, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 September and 31 December 1991, and 29 February 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 29 February 1992, the Applicant filed an application requesting the Tribunal to find:

> "(1) that Applicant was fully qualified to be recommended by her Department for post No. UNA-27775-E-P3-003 within the framework of the Internal Vacancy Announcement, and that such a recommendation should now be made without further delay (...);
>
> (2) that Applicant be paid a Special Post Allowance to the P-3 level also in case her candidacy is successful, until such time when she is promoted against that post (...); and
>
> (3) that Applicant be awarded appropriate compensation for the injury and delays she has suffered as a result of the Administration's repeated violation of her right to fair treatment (...)."

Whereas the Respondent filed his answer on 1 August 1992;

Whereas the Applicant filed written observations on 30 November 1992;

Whereas, on 3 June 1993, the Applicant submitted additional documents;

Whereas, on 10 June and 21 June 1993, the Tribunal put questions to the Respondent, who on 17 June and 21 June 1993, provided answers thereon;

Whereas, on 20 June 1993, the Applicant submitted her comments thereon;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 October 1968, as a Clerk-Typist at the G-2 level, for the duration of the twenty-third session of the General Assembly. She was assigned to the Press Pool, Press and Publications Division, Department of Public Information (DPI). On the expiration of her appointment, she was offered another three-month fixed-term appointment, which was converted to a probationary appointment, with effect from 24 March 1969. On 1 April 1969, she was promoted to the G-3 level and on 1 October 1970, she was granted a permanent appointment. On 1 April 1973, she was promoted to the G-4 level and on 1 February 1979, to the G-5 level, as a Research Assistant. In March 1981, she was assigned to the Radio and Visual Services Division (RVSD) Department of Public Information. As a result of the implementation of the classification of posts in the General Service and Related Categories in New York, she was promoted to the P-2 level, as an Associate Information Officer, with effect from 1 January 1986. On 2 October 1987, she was reassigned within RVSD to the Promotion and Distribution Unit, DPI.

On 12 August 1988, the Applicant assumed the functions of a P-3 post in that unit, replacing the incumbent, who had been reassigned. At the Applicant's request and with the Executive Office's concurrence, she was granted a Special Post Allowance (SPA) to the P-3 level, with effect from 12 March 1989.

Upon the P-3 post she had occupied becoming vacant, an Internal Vacancy Announcement to advertise her P-3 post of Information Officer was issued, the deadline for applications being 6 August 1990. The Applicant, who had submitted an application for this vacancy, was informed on 15 October 1990, that she had not been selected for the position and that no other internal candidates had been selected. On 25 October 1990, the Applicant's SPA was discontinued, and she was re-assigned to her former P-2 post.

On 2 November 1990, the Applicant requested the Secretary-General to review the administrative decision not to select her for the P-3 position.

An external Vacancy Announcement was issued for the post for which the Applicant had applied, with a deadline of 10 December 1990.

On 20 December 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in which she requested, under staff rule 111.2(f), suspension of the external vacancy announcement. On 31 January 1991, the JAB recommended unanimously that the Secretary-General suspend action on the filling of the post.

On 6 February 1991, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had taken note of the Board's report and had "decided, taking into account the entire circumstances of the case, that action on the filling of the post ... be suspended for twenty-one days to enable the Board to consider, during that period, the substance of your appeal".

The Board adopted its report on the merits of the case on 19 March 1991. Its recommendation reads as follows:

Recommendation

16. The majority of the Panel recommends that:

(a) The Appointment and Promotion body convened to consider candidates for post No. UNA-27775-E-P3-003 (Vacancy Announcement No. 90-I-DPI-19-NY)

should receive detailed analyses of the qualifications of the internal candidates short-listed as a result of internal vacancy announcement No. 90-I-DPI-347-NY; these analyses should be prepared on the same basis, and in a comparable format, as those for external candidates and should cover, but not be restricted to, marketing qualifications;

(b) The Appointment and Promotions body should be given all information necessary to enable it to give fair and full consideration to Appellant and all other internal and external candidates; it should, therefore, receive a copy of this Report;

(c) A PER [Performance Evaluation Report] should be prepared forthwith for the period Appellant performed the functions of the post in question, and that PER should be part of the submission to the Appointment and Promotion body reviewing candidates for the post;

(d) Without wishing to prejudice the results of the review, should Appellant not be chosen for the post, she should be paid an SPA to the P-3 level from October 1990, until she was transferred to another assignment."

In a dissenting opinion, a member of the Panel stated in part:

"... I find that the majority of the Panel failed to properly investigate DPI's allegations that Appellant did not 'fully' meet all the requirements of the contested post."

and

"... I would recommend that all of Appellant's pleas be sustained."

On 25 March 1991, the Officer-in-Charge, Department of Administration and Management, transmitted to the Applicant a copy of the JAB report and stated:

"The Secretary-General has re-examined your case in the light of the Board's report including the dissenting opinion. He has decided to accept the recommendation of the majority of the Board contained in ... the report that:

(a) the Appointment and Promotion body convened to consider candidates for post No. UNA-27775-E-P3-003 (vacancy announcement No. 90-I-DPI-19-NY) should receive detailed analyses of the qualifications of the internal candidates short-listed as a result of internal vacancy announcement No. 90-I-DPI-347-NY; these analyses should be prepared on the same basis, and in a comparable format, as those for external candidates and should cover, but not be restricted to, marketing qualifications;

(b) the Appointment and Promotion body should be given all information necessary to enable it to give fair and full consideration to Appellant and all other internal and external candidates; it should, therefore, receive a copy of the Board's Report;

(c) a PER should be prepared forthwith for the period Appellant performed the functions of the post in question, and that PER should be part of the submission to the Appointment and Promotion body reviewing candidate for the post; and

(d) should you not be selected for the post, that you be paid Special Post Allowance from October 1990 to the date of your assignment to another post."

On 29 February 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JAB erred in dismissing her appeal as it did not consider the absence of her performance evaluation reports when making its recommendations but relied instead on the evaluation statement made by the Department. On the basis of her two performance evaluation reports which were subsequently prepared, she should have been recommended for promotion by her Department.

2. Because she is a staff member, the Applicant is entitled to have her candidacy evaluated against other staff members only. Consideration of her candidacy together with external candidates amounts to violation of her rights.

3. After the discontinuation of the SPA in October 1990, the Applicant has continued to perform the same functions. She is, therefore, entitled to be paid an SPA for this period whether or not she is eventually promoted.

Whereas the Respondent's principal contentions are:

1. The evaluation of staff for promotion is a discretionary act of the Secretary-General which can only be challenged if such evaluation is tainted with prejudice or discrimination or improper motive. The Applicant has been given full and fair consideration for promotion and has failed to establish any improper motivation.

2. The Applicant did not meet the requirements set forth in staff rule 103.11(b) and is not entitled to an SPA, since 25 October 1990.

The Tribunal, having deliberated from 10 June to 25 June 1993, now pronounces the following judgement:

I. The Applicant asserts that the Joint Appeals Board (JAB) erred inasmuch as, in discussing her appeal, it did not consider the absence of her performance evaluation reports when making its recommendations, but relied instead on the statement dated 18 December 1990, by the Under-Secretary-General for the Department of Public Information (DPI) to the Chief, Administrative Review Unit. The Applicant also argues that on the basis of her two performance evaluation reports, which were subsequently prepared, she should have been recommended for promotion to the P-3 level by her department. She further contends that, as a staff member, she is entitled to have her candidacy assessed against other staff members only and that consideration of her candidacy, together with external candidates, amounts to violation of her rights.

II. The Applicant argues that after the discontinuation of the Special Post Allowance (SPA) on 25 October 1990, she continued to perform the same functions and was, therefore, entitled to be paid an SPA to the P-3 level, from that date until she was assigned to another post. She also requests appropriate compensation for the injury and delays she has suffered.

III. The main issue for the Tribunal is to determine the validity of the decision not to recommend the Applicant for a P-3 post, the functions of which she had performed since 12 August 1988 and for which she was granted an SPA to the P-3 level, with effect from 12 March 1989.

IV. In accordance with the Tribunal's jurisprudence, a staff member has no automatic right to promotion. (Cf. Judgement No. 134, Fürst (1969), para. III). The Tribunal has also held that promotions are at the discretion of the Secretary-General and that, as a consequence, qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and cannot be considered by staff members as giving rise to any expectancy of promotion. (Cf. Judgement No. 312, Roberts (1987), para. II and Judgement No. 586, Atefat (1992), para. V).

V. At the same time, the Tribunal has consistently held that staff members are entitled to be properly considered for promotion and that failure on the part of the Administration to accord such consideration constitutes a violation of the staff member's rights and may call for compensation. (Cf. Judgement No. 266, Capio (1980)). The Applicant claims that by failing to prepare, in a timely fashion, her two performance evaluation reports, the Administration deprived her of her right to be properly considered for promotion.

VI. The Tribunal notes that upon appointment of the former incumbent to another post, an undated internal vacancy announcement

was issued with a deadline of 6 August 1990. The Applicant, who submitted her application for that vacancy, was not selected. Nor was any other internal candidate selected. An undated external vacancy announcement for the same post was subsequently issued, with a deadline for applications of 10 December 1990.

VII. The Tribunal further notes that, at the request of the Applicant and on the recommendation of the JAB, the Secretary-General decided on 6 February 1991, to suspend action for 21 days on the filling of the post, to enable the JAB to consider, during that period, the substance of the appeal lodged by the Applicant in which, inter alia, she requested suspension of the external vacancy announcement.

VIII. The Tribunal observes that neither the Appointment and Promotion Board nor the JAB had before them the two performance evaluation reports on the Applicant for the periods 16 April 1987 to 7 August 1989 and again, from 8 August 1989 to 31 March 1991. According to the Applicant's file, it was only in mid-June 1991, that the Applicant received and signed the two performance evaluation reports in question.

The Tribunal must take into account the Administration's failure to provide the appropriate bodies, in a timely fashion, with complete and accurate information on the Applicant's performance. As stated in Judgement No. 331, Large (1984), para. VI, "the Tribunal has held that all efforts must be made to have these [performance evaluation] reports prepared on time and in proper form...". In the present case, the two performance evaluation reports were completed three months after the JAB submitted its report. The JAB based its recommendations on a statement made on 18 December 1990, by the Under-Secretary-General, DPI, to the Chief, Administrative Review Unit, during the JAB proceedings. This statement could not replace the contents of a performance evaluation report.

IX. The Tribunal took note of the Respondent's contention that an updated performance evaluation report is not relevant in relation "to the determination of whether or not Applicant was fully qualified for the post" (emphasis in the original). The Tribunal does not accept this view and recalls that, in accordance with its jurisprudence, "it is the responsibility of the Administration to ensure that personnel records required by promotion review bodies are complete, up-to-date, and submitted in a timely fashion". (Cf. Judgement No. 608, Atefat (1992), para. IX).

X. The Tribunal emphasizes that the Administration was not obliged to promote the Applicant. The Tribunal considers, in keeping with its jurisprudence, that the Applicant was entitled to fair and adequate consideration for promotion. Explaining the reasons for rejecting the application, the Under-Secretary-General, DPI, stated on 18 December 1990, that the Applicant "did not meet fully the required experience in marketing ..." and that "the function she performed, though satisfactorily, did not include the marketing functions ... as reflected in the classified job description for the post in question."

XI. The Tribunal observes that, the two performance evaluation reports contain an express disavowal of the above statement: the performance evaluation reports confirm the Applicant's experience in marketing. On the basis of the report of the Rebuttal Panel constituted to consider the Applicant's rebuttal to her second performance evaluation report, the Under-Secretary-General, DPI, recommended on 7 January 1992, the deletion of the comments by the Second Reporting Officer about the Applicant's alleged lack of experience in the "promotional part of her work". In the view of the Tribunal, this is a clear acknowledgement that the information contained in the statement dated 18 December 1990, was not accurate. The Tribunal concludes that the decision not to promote the Applicant to the P-3 post was thus made on the basis of incomplete and inaccurate information. The Applicant's right to fair and full consideration for promotion was not adequately respected and, consequently, the responsibility of the Administration is engaged.

XII. The Tribunal will not speculate on what the outcome of the Applicant's request for promotion might have been if the two performance evaluation reports containing the overall rating of a "very good performance" had been submitted on time. The Tribunal holds that their non-submission in time constitutes an omission, which violates paragraphs 4 and 5 of administrative instruction ST/AI/240/Rev.2.

XIII. The Applicant asserts that while she had received an SPA to the P-3 level, from 12 March 1989 to 25 October 1990, she continued to perform the same functions for 16 months thereafter. The Tribunal notes that on 19 March 1991, the JAB recommended, and on 25 March 1991, the Secretary-General agreed, that should the Applicant not be chosen for the P-3 post, she should be paid an SPA to the P-3 level from October 1990, until she was reassigned.

XIV. The Tribunal notes that the Respondent, in his answer, states that, for purposes of an SPA, a staff member is regarded as having assumed the full duties and responsibilities of a higher-level post only if he or she is assigned to that post on the official manning table. The Respondent further states, that upon the discontinuation of her SPA in October 1990, the Applicant was placed against a P-2 post and she was no longer required to perform the functions of the P-3 post. The Respondent therefore asserts that the Applicant is not entitled to an SPA after 25 October 1990, irrespective of whether or not she was selected for the P-3 post in question. The Tribunal, however, has not found that with the discontinuance of the SPA, the functions of the Applicant reverted to those of the P-2 level.

XV. The Tribunal notes that despite the acceptance by the Secretary-General, on 25 March 1991, of the recommendation of the JAB, the Respondent, in his answer dated 11 August 1992, claims that it was in fact "impossible" to give effect to the decision of the Secretary-General.

XVI. In the light of the above facts and considerations, the Tribunal finds no valid reasons why the initial commitment undertaken on behalf of the Secretary-General should not be fulfilled. The Tribunal considers that once the decision to grant the Applicant an SPA, which is discretionary, has been properly taken, such decision must be implemented. Inasmuch as this commitment has not been kept, the Tribunal considers that the Applicant is entitled to suitable compensation, which the Tribunal assesses at $10,000.

XVII. The Tribunal trusts, in addition, that, as compensation for the injury sustained by the Applicant, she will receive priority consideration for promotion, at the earliest possible date, to a vacant P-3 post for which she is qualified.

XVIII. In the light of the foregoing, the Tribunal orders the Respondent to pay to the Applicant the amount of $10,000.

All other claims are rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Ioan VOICU
Member

Francis SPAIN
Member

Geneva, 25 June 1993

R. Maria VICIEN-MILBURN
Executive Secretary